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No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

JEFFREY WAYNE ABBETT,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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QUESTION PRESENTED

When the trial judge in a criminal case fails to instruct the jury on an essential element of the crime charged, despite defense requests for such an instruction, is the defendant denied his right to a fair trial and to trial by jury given this Court's pronouncements that "the error is... fundamental... not to submit to the jury the essential ingredients of the only offense on which the conviction could rest", Screws v. United States, 325 U.S. 91 (1945), and "a judge may not direct a verdict of guilty no matter how conclusive the evidence", United Brotherhood of Carpenters & Joiners of America v. United States, 330 U.S. 395 (1947)?

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

JEFFREY WAYNE ABBETT,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

OPINIONS BELOW

The memorandum opinion of the Superior Court of Pennsylvania, dated April 6, 1984, is unreported. It is contained in the appendix to this petition (Pet. App. A1-A3). The opinion and order of the Court of Common Pleas of Cumberland County, Pennsylvania is also unreported, but is contained in the appendix to this petition (Pet. App. A4-A35).

JURISDICTION

Petitioner was convicted in the Court of Common Pleas of Cumberland County, Pennsylvania. A timely appeal was taken to the Superior Court of Pennsylvania in accordance with 42 Pa. Cons. Stat. Ann. §742. The Superior Court of Pennsylvania issued its opinion affirming the conviction on April 6, 1984 (Pet. App. A36). A petition for rehearing was denied on June 5, 1984 (Pet. App. A37).

Petitioner thereafter sought discretionary review in the Supreme Court of Pennsylvania by filing a petition for allowance of appeal under 42 Pa. Cons. Stat. Ann. §724(a). The petition for allowance of appeal was denied on October 12, 1984 (Pet. App. A38). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Const. amend. XIV provides in part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law... .

United States Const. amend. VI provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State... .

Act of December 6, 1972, Pub. L. No. 1482, §1, (enacted as 18 Pa. Cons. Stat. Ann. §301), defining "possession," provides in part:

> An act, within the meaning of this section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

STATEMENT OF THE CASE

Jeffrey Wayne Abbott was charged with possession of marijuana with intent to deliver, contrary to 35 Pa. Cons. Stat. Ann.

§780-101, et seq. The District Attorney of Cumberland County, Pennsylvania filed an information charging that Abbett "did unlawfully, and feloniously, knowingly, or intentionally possess with the intent to deliver a controlled substance, to-wit: marijuana...." (Pet. App. A39). (emphasis added) The matter was tried to a jury on February 17, 1982 and a verdict of guilty was returned that same date.

The trial evidence showed that Abbett was driving a van westbound on the Pennsylvania turnpike at approximately 2:50 A.M. on October 16, 1981. Another person, Richard DiMatteo, was riding as a passenger. At about three and a half miles east of a turnpike interchange, the van was observed by two troopers of the Pennsylvania State Police. The troopers stopped the van for violation of the vehicle code

-- operating a television visible to the driver.

While approaching the van and shining a flashlight in the rear of the van to determine the presence of other occupants, one of the troopers observed what appeared to be a brick of marijuana protruding from a ripped, brown paper bag located in an open cardboard box. The box was positioned about two feet from the rear window of the van.

Beneath that box was a blanket, and beneath the blanket were four other boxes, beneath which were four paper-wrapped parcels. The blanket did not completely cover the boxes such that the trooper could observe that, with the exception of the box containing the apparent marijuana, all other containers were closed and sealed. The trooper was not able to

observe the contents of these containers.

Based upon these circumstances, as well as the observation made by one of the troopers of what seemed to be an "overwhelming" odor of marijuana, an application for a search warrant was made. A subsequent search in execution of the search warrant disclosed that the boxes contained approximately 251 pounds of marijuana.

Before the jury began its deliberations on this evidence, Abbett's counsel submitted requested jury instructions on the issue of criminal knowledge. Defendant's Requested Instruction No. 4 stated:

> One of the elements of the offense of possession of marijuana with intent to distribute it is knowledge of the presence of the marijuana, and the intent to distribute that marijuana of which there is knowledge. It is not sufficient if a defendant should have known that there was marijuana present. The Commonwealth to prove its case must prove beyond a

reasonable doubt that he had actual knowledge of the presence of the marijuana and actual intent to distribute it.

In Defendant's Requested Instruction No. 6 the element of knowledge was again discussed:

> A defendant to be found guilty of the crime of possession of marijuana with intent to deliver it must have actual knowledge of the existence of the marijuana. The knowledge of someone else, regardless of whether it is claimed he is a joint possessor or a co-conspirator, cannot be imputed to the defendant. The defendant's knowledge must be actual and not the knowledge of someone else.

The trial judge rejected these requested instructions. Instead the judge instructed the jury about the elements of the crime without reference to the element of knowledge, as follows:

> Now, as indicated, there are three things that you'll have to find in this case. The first will be that Mr. Abbett possessed the marijuana, and we'll talk about all these a little bit later. Secondly, that he possessed it with the intention to

> deliver it as against with the intention of using it. And, third, of course, you're going to have to find that the substance that we're dealing with, and its all here over the courtroom, was marijuana as defined by the Statute, and a substance that is controlled and one which you may not possess or use or deliver without a license.
>
> * * *
>
> The Commonwealth is asking you to find that this possession was with an intent to deliver it from the mere fact that there was such a substantial amount of it, and that it was not the kind of an amount that somebody would possess for their own use, even if it were tobacco instead of something else, it would still be a sizable amount of material for someone to use for their own purpose, and they're asking you to reach the conclusion that that was the reason for a finding by you that it was possession with intent to deliver.

Following the trial Abbett filed post-verdict motions asserting that the trial court had neglected to instruct the jury on an essential element of the offense, knowledge. The trial court rejected this argument for a new trial

stating:

> Lastly, the defendant contends that the court erred when it failed to give requested instructions nos. 3-6... . Our review of the record reveals, however, that the general charge covered many of the points requested in these specific instructions, although the wording of the defendant's points was not used. All requested instructions concerning the possessory element of the crime were adequately covered.

(Pet. App. A32-A33.)

Abbett raised the same issue on his appeal to the Superior Court of Pennsylvania. That court merely stated:

> The appellant raises 11 issues for our review involving: ... the trial court's failure to give various jury instructions requested by the appellant. We find no merit to any of these contentions.

(Pet. App. A2.)

In his petition for allowance of appeal Abbett again raised the issue of the trial court's failure to give a jury instruction on an essential element of the

offense. Discretionary review, however, was not granted.

REASONS FOR GRANTING THE WRIT

I.

THE TRIAL COURT'S FAILURE, OVER OBJECTION, TO INSTRUCT THE JURY ON THE ESSENTIAL ELEMENT OF CRIMINAL KNOWLEDGE DEPRIVED PETITIONER OF A FAIR TRIAL IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In Screws v. United States, 325 U.S. 91 (1945), the Supreme Court reviewed a conviction for "willfully" depriving a person of his federal civil rights. In the instructions to the jury the trial judge omitted any definition of the specific intent element of the offense. In supporting a reversal of the conviction, a plurality of the Court concluded that the trial judge's omission of the mental element of the offense deprived the defendant of a fair trial:

> The difficulty here is that this question of intent was not submitted to the jury with proper instructions... [I]n view of our construction of the word "willfully" the jury should have been further instructed that it was not sufficient that petitioners had a generally bad purpose. To convict it was necessary for them to find that petitioners had the purpose to deprive the prisoner of a constitutional right... .

325 U.S. at 106-107.

Even though defense counsel in Screws had not objected to this omission in the instructions, the Court concluded that the error resulted in the denial of a fair trial:

> And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense from which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a Federal crime are entitled to be tried by the standards of guilt which Congress has prescribed.

325 U.S. at 107.

More recently, this Court granted review to determine whether constitutional error results from a trial court's failure to properly instruct the jury on basic constitutional principles that attend a criminal trial. In the course of these decisions this Court has stressed that the trial court's explanation of the law must be complete and accurate. For example, in Carter v. Kentucky, 450 U.S. 288, 302 (1981), this Court noted:

> Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law.

It cannot be disputed that under Pennsylvania law the crime for which petitioner was charged includes the mental element of "knowledge." In Commonwealth v. Rambo, 488 Pa. 334, 412 A.2d 535 (1980), the Pennsylvania Supreme Court reviewed precisely the same criminal statute

forming the basis for petitioner Abbett's charge, 35 Pa. Cons. Stat. Ann. §780-113(a)(30). Rambo challenged his conviction claiming there was insufficient evidence that he knew of the presence of a controlled substance in his possession. The court stated, at 412 A.2d 537: "Such knowledge is required by statute and our case law in order to prove possession of a controlled substance." The court concluded that "knowledge" was an element of the offense, relying on the Pennsylvania statute which includes such an element for crimes of possession, namely, 18 Pa. Cons. Stat. Ann. §301. It then defined this term:

> Our cases have construed this "knowledge" or "awareness" element as the exercise of conscious dominion or control over the controlled substance.

Id. at 537.

Other authority requiring proof that

the defendant "knowingly" possessed a controlled substance is found in Commonwealth v. Chenet, 473 Pa. 181, 185, 373 A.2d 1107, 1109 (1977); Commonwealth v. Fortune, 456 Pa. 365, 368, 318 A.2d 327, 328 (1974). See also, Commonwealth v. Luddy, 281 Pa. Super. 541, 422 A.2d 601, 606 (1981).

Despite this authority the Pennsylvania courts reviewing Abbett's conviction simply ignored Abbett's argument on post-conviction motions and appeal that the omission of an instruction on the element of knowledge deprived him of a fair trial. In so doing the Pennsylvania courts failed to heed this Court's admonition in Bollenbach v. United States, 326 U.S. 607, 613 (1946) that a "conviction ought not to rest on an equivocal direction to the jury on a basic issue."

II.

THE TRIAL COURT'S FAILURE, OVER OBJECTION, TO INSTRUCT THE JURY ON THE ESSENTIAL ELEMENT OF CRIMINAL KNOWLEDGE CONSTITUTED A PARTIAL DIRECTED VERDICT OF GUILTY DEPRIVING PETITIONER OF HIS RIGHT TO TRIAL BY JURY IN VIOLATION OF THE SIXTH AMENDMENT.

It is an established constitutional principle of criminal procedure that the trial court may not direct the jury to render a verdict of guilty. In United Brotherhood of Carpenters & Joiners of America v. United States, 330 U.S. 395, 408 (1947), this Court reversed a conviction where the jury was improperly instructed on an element of the offense necessary to find criminal liability:

> No matter how strong the evidence may be of [the defendant's] participation through its agents in the conspiracy, there must be a charge to the jury setting out correctly the limited liability [of the defendant] for acts of its agents. For a judge may not direct a verdict of guilty no matter how conclusive the evidence. . . . A

> failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction.

(emphasis added)

The same error occurs when, as in the instant case, the trial court omits an instruction on an essential element of the offense charged. This omission similarly accomplishes a partial directed verdict on one of the elements of the offense because the issue then is withdrawn from the jury's consideration. The trial court thus deprived Abbett of his constitutional right to have the issue determined by a jury.

A similar circumstance led to the reversal of a drug conviction in Casella V. United States, 449 F.2d 277, 283 (3d Cir. 1971), where the court found that the trial judge "gave a charge which withdrew from the jury the determination of one

essential element of the crime, namely, whether Casella had knowledge of illegal importation." The Third Circuit determined that the withdrawal of the essential element of knowledge from the jury's consideration deprived the defendant of his Sixth Amendment right. See also, United States v. Manuszak, 234 F.2d 421, 424-25 (3d Cir. 1956).

Despite his invocation of his constitutional right to trial by jury, the issue of whether Abbett "knowingly" possessed marijuana never was decided by the jury. Instead of receiving "the common sense judgment of a jury", Abbett was subjected to "the more tutored but perhaps less sympathetic reaction of the single judge" on the issue of knowledge. Duncan v. Louisiana, 391 U.S. 145, 156 (1968). Some of the issues pertaining to his guilt were

determined by the jury of twelve; but the important issue of his knowledge or awareness of the presence of marijuana was decided against him outside the protections of the Constitution.

III.

REVIEW SHOULD BE GRANTED BECAUSE A DECISION ON PETITIONER'S CONSTITUTIONAL CLAIM WOULD CLARIFY RECENT DECISIONS OF THIS COURT ON THE CONSTITUTIONAL IMPLICATIONS OF ERRORS IN CRIMINAL JURY INSTRUCTIONS.

In Taylor v. Kentucky, 436 U.S. 478 (1978), this Court concluded that the due process clause of the Fourteenth Amendment was violated by a trial court's refusal to give a requested defense jury instruction on the presumption of innocence and its failure to instruct on that principle of law altogether. More recently, in Carter v. Kentucky, 450 U.S. 288 (1981), this Court determined that, upon request, a defendant is entitled to an instruction

that the jury may not draw any adverse inference of guilt from the defendant's failure to testify. These decisions are recent additions to this Court's effort to assure that juries in criminal cases are instructed "in the basic constitutional principles that govern the administration of criminal justice." Lakeside v. Oregon, 435 U.S. 333, 342 (1978). A decision on petitioner's constitutional claim in this matter would naturally complement this prior case law by clarifying whether the omission of a criminal jury instruction on an essential element of the crime charged is an error of constitutional dimension.

Certiorari also should be granted because the state courts of Pennsylvania have acted to deny petitioner's substantial constitutional rights. See, e.g., Reynolds v. Cochran, 365 U.S. 525, 527

1981).

CONCLUSION

It is axiomatic that a criminal defendant is entitled to the trial court's instruction on each of the elements of the crime charged when the defendant has requested a trial by jury. Further, directed verdicts of guilty are foreign to our criminal jurisprudence. Despite pronouncements of this Court to that effect, petitioner Abbett was convicted without a trial on all the elements of the offense charged.

A definitive ruling from this Court on Abbett's constitutional claim will significantly aid the administration of criminal justice by expressly confirming on constitutional grounds the earlier pronouncements of this Court that it is fundamental error "not to submit to the

jury the essential ingredients" of the crime charged (Screws v. United States, 325 U.S. 91, 107 (1945)) and that "a judge may not direct a verdict of guilty no matter how conclusive the evidence" (United Brotherhood of Carpenters & Joiners of America v. United States, 330 U.S. 395, 408 (1947).

For the foregoing reasons, petitioner respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
VS	:	
JEFFREY WAYNE ABBETT, Appellant	:	No. 02027 Philadelphia 1982

APPEAL FROM THE JUDGMENT OF SENTENCE OF JULY 8, 1982 IN THE COURT OF COMMON PLEAS OF CUMBERLAND COUNTY, CRIMINAL NO. 907, 1981

BEFORE: CAVANAUGH, CIRILLO and WATKINS, JJ.

MEMORANDUM OPINION:

On February 17, 1982 the appellant, Jeffrey Wayne Abbett, was tried by the Honorable Dale F. Shughart and a jury and convicted of unlawful possession with intent to deliver a Schedule I controlled

substance.[1] Post verdict motions for a new trial and in arrest of judgment were timely filed and denied. Then, on July 8, 1982, the appellant was fined $2,500.00 and sentenced to a term of imprisonment of not less than two years nor more than four years. This appeal followed.

The appellant raises eleven issues for our review involving: sufficiency of the evidence; the trial court's denial of his motion to suppress; the testimony of the prosecution's expert witness; the trial court's failure to conduct an instruction conference; and the trial court's failure to give various jury instructions requested by the appellant. We find no merit to any of these contentions.

---

[1]Act of April 14, 1972, P.L. 233, No. 64, §13, as amended, 35 P.S. §780-113(a)(30).

The comprehensive Opinion of the trial court en banc (Shughart, P.J., Sheely, J. and Hoffer, J.) thoroughly examines all of the issues preserved for review by this Court. Accordingly, we adopt this Opinion as our own for purposes of allocatur.

Judgment of sentence affirmed.

COMMONWEALTH	:	IN THE COURT OF COMMON PLEAS OF CUMBERLAND COUNTY, PENNSYLVANIA
	:	
	:	907 CRIMINAL 1981
	:	
v.	:	CHARGE: UNLAWFUL POSSESSION OF A SCHEDULE I CONTROLLED SUBSTANCE WITH INTENT TO DELIVER
	:	
JEFFREY WAYNE ABBETT	:	AFFIANT: TPR. ANDREW KORNOVA

IN RE: MOTIONS IN ARREST OF JUDGMENT AND FOR A NEW TRIAL

Before SHUGHART, P.J., SHEELY, J. and HOFFER, J.

OPINION and ORDER OF COURT

The defendant filed motions in arrest of judgment and for a new trial following his conviction by a jury on the charge of possession with intent to deliver a

controlled substance.[1] Viewed in the light most favorable to the Commonwealth, the evidence showed that the defendant was driving a van westbound on the Pennsylvania Turnpike at approximately 2:50 a.m. on October 16, 1981. At about three and a half miles east of the Carlisle interchange, the van was observed by two troopers of the Pennsylvania State Police. The troopers stopped the van for a violation of the Vehicle Code -- operating a television visible to the driver.[2] Upon approaching the van, one of the troopers observed, in plain view, a brick of suspected marihuana protruding from an open

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[1]The Controlled Substance, Drug, Device and Cosmetic Act of April 14, 1972, P.L. 233, No. 64, §13(a)(30), as amended, 35 P.S. §780-113(a)(30).

[2]Vehicle Code of June 17, 1976, as amended, 75 Pa.C.S.A. §4527.

cardboard box, which was located about two feet from the rear window of the van. This box was atop several others. A search conducted pursuant to a validly executed search warrant disclosed that the boxes contained a total of approximately 251 pounds of marihuana. The defendant was convicted of possession with intent to deliver on February 17, 1982.

I.

In his motion in arrest of judgment, the defendant first raises the issue of venue. He alleges that "[t]his court is without jurisdiction over the offense, in that the prosecution failed to prove that the offense wa committed within the venue of Cumberland County." Defendant's Amended Motion in Arrest of Judgment ¶1. The applicable law fails to support the defendant's position.

The law regarding jurisdiction over criminal cases is well settled. In short, the subject matter jurisdiction of this court in criminal matters extends only to offenses committed within Cumberland County, unless otherwise provided by statute: See Commonwealth v. Mull, 316 Pa. 424, 175 A. 418 (1934); Commonwealth v. Simeone, 222 Pa. Superior Ct. 376, 294 A.2d 921 (1972). Consequently, "the locus of a crime is always in issue." Mull, 316 Pa. at 426, 175 A.2d at 419. The Commonwealth has the burden of proving the court's jurisdiction, Commonwealth ex rel. Chatary v. Nailon, 416 Pa. 280, 206 A.2d 43 (1965), which is a legal issue, normally decided by the trial judge. Commonwealth v. Bighum, 452 Pa. 554, 307 A.2d 225 (1973); Commonwealth v. Ohle, ___ Pa. Superior Ct. ____, 435 A.2d 592 (1981).

Only when jurisdiction depends upon the resolution of disputed facts is it a question for the jury. Mull, supra; Ohle, supra; Commonwealth v. Kloss, 253 Pa. Superior Ct. 559, 385 A.2d 480 (1978); Commonwealth v. Wojdakowski, 161 Pa. Superior Ct. 250, 53 A.2d 851 (1947). When the locus of the crime is uncontested and only "technically in issue,"[3] the court can take judicial notice of it being in the county of the court's jurisdiction. Commonwealth v. Lawrence, 282 Pa. 128, 127 A. 465 (1925); Commonwealth v. Varner, 265

[3]When the jurisdiction, or venue, of the court is undisputed and unchallenged by the criminal defendant, before or during trial, and raised for the first time in post-trial motions, both the Pennsylvania Supreme and Superior Courts have considered the locus of the crime as being "technically in issue," allowing judicial notice to be taken at the post-trial stage of the proceedings. See Commonwealth v. Kaiser, 184 Pa. 493, 39 A. 299 (1898); Commonwealth v. Varner, 265 Pa. Superior Ct. 329, 401 A.2d 1235 (1979).

Pa. Superior Ct. 329, 401 A.2d 1235 (1979), even if the evidence is very slight. Commonwealth v. Kaiser, 184 Pa. 493, 39 A. 299 (1898).

Applying this law to the facts of the instant case, we conclude that the Commonwealth has met its burden. Although none of the Commonwealth's witnesses explicitly testified that the offense was committed in Cumberland County, one of its witnesses, Trooper Kornova of the Pennsylvania State Police, did testify that the van operated by the defendant, within which the contraband was being transported, was pulled over at milepost 228.3 on the Pennsylvania Turnpike.[4] Just moments before, the

[4]Page references are to the Notes of Testimony of the February 16-17, 1982, jury trial.

trooper had testified tht the van was first observed at milepost 228.4, approximately three and a half miles east of the Carlisle interchange. N.T.9. It is a well-known geographic fact among the people of Cumberland County that the area three and a half miles east of the Carlisle interchange on the turnpike is within the boundaries of Cumberland County. Indeed, the turnpike runs east through Cumberland County to a point east of the Gettysburg Pike interchange, near Mechanicsburg at the eastern end of the county, well beyond the Carlisle interchange. Nowhere in the record is there evidence that the locus of the crime was contested by the defendant. Since it is well known that the locus of the crime as identified in the record is within Cumberland County, this court, at this point in the proceedings, could take

judicial notice to satisfy the jurisdictional requirement. Commonwealth v. Varner, 265 Pa. Superior Ct. 329, 401 A.2d 1235 (1979).[5] That is not required, however, since, per defense counsel's request, the matter was put before the jury. The guilty verdict returned by the jury conclusively establishes its acceptance of the uncontroverted testimony regarding the locus of the crime.

The remaining grounds for the defendant's motion in arrest of judgment go to the sufficiency of the evidence. First,

[5] In Varner, the Pennsylvania Superior Court affirmed the action by the Court of Common Pleas of Franklin County in overruling the defendant's post-trial motion on the issue of jurisdiction. The trial court had taken judicial notice that the area near the Shippensburg Fair Grounds was within Franklin County. Like the instant case, none of the witnesses had specifically stated that the locus of the crime was within the county of the court trying the case.

the defendant contends that the Commonwealth failed to prove the defendant's constructive possession of marihuana.

The law pertaining to the element of possession in drug-related cases can be summarized as follows: Whether the evidence is sufficient to establish possession turns on the individual facts of the case. Commonwealth v. Ferguson, 231 Pa. Superior Ct. 327, 331 A.2d 856 (1974). Mere presence at the site of the controlled substance is not enough to show possession, Commonwealth v. Townsend, 428 Pa. 281, 237 A.2d 192 (1968); instead, the Commonwealth must prove that the defendant had the intent to exercise conscious dominion and control over the substance. Commonwealth v. Rambo, 488 Pa. 334, 412 A.2d 535 (1980); Commonwealth v. Fortune, 456 Pa. 365, 318 A.2d 327, (1974);

Commonwealth v. Fassett, 260 Pa. Superior Ct. 323, 394 A.2d 573 (1978). These elements may be proved by circumstantial evidence--inferred from the totality of the surrounding circumstances. Fortune, supra; Commonwealth v. Shaffer, 447 Pa. 91 288 A.2d 727, cert. denied, 409 U.S. 867 (1972); Ferguson, supra. See also Commonwealth v. Minoske, ___ Pa. Superior Ct.__, 441 A.2d 414 (1982). When the controlled substance is not found on the defendant, the Commonwealth must prove constructive possession. Commonwealth v. Stokes, ___ Pa. Superior Ct. ___, 440 A.2d 591 (1982). A showing of joint constructive possession is enough to sustain a conviction. Commonwealth v. Gilchrist, 255 Pa. Superior Ct. 252, 386 A.2d 603 (1978) (per curiam). In other words, a conviction can be secured even though another individual

had equal access to the controlled substance. Factors supporting an inference of possession include, inter alia, the close proximity of the defendant to the controlled substance, Commonwealth v. Gill, 490 Pa. 1, 415 A.2d 2 (1980), the plain view of the substance, Gilchrist, supra, its easy access to the defendant, id., and the defendant's actions, such as his attempt to conceal it, Shaffer, supra. To obtain a conviction for possession with intent to deliver a controlled substance (35 P.S. §780-113(a)(30)), the Commonwealth must additionally prove that the defendant had the intent to deliver. Commonwealth v. Bagley, ___ Pa. Superior Ct. ___, 442 A.2d 287 (1982). Such an intent may be inferred from the quantity of drugs discovered. Commonwealth v. Santiago, 462 Pa. 216, 340 A.2d 440 (1975).

When viewed in the light most favorable to the Commonwealth,[6] the evidence is sufficient to show that the defendant constructively possessed marihuana. The evidence showed that the defendant and codefendant DiMatteo were the only two

[6] In passing upon the defendant's motion in arrest of judgment, the sufficiency of the evidence must be evaluated upon the entire trial record. All of the evidence must be read in the light most favorable to the Commonwealth and it is entitled to all reasonable inferences arising therefrom. The effect of such a motion is to admit all the facts which the Commonwealth's evidence tends to prove. (Citations omitted.) Also, in passing upon such a motion, all evidence actually received must be considered, whether the trial rulings thereon were right or wrong. (Citations omitted).

Commonwealth v. Tabb, 417 Pa. 13, 16, 207 A.2d 884, 886 (1965).

occupants of the van, N.T. 16; that the defendant was the driver, N.T. 11; that an "overpowering" odor or marihuana eminated from the van, N.T. 17-18; that a brick of marihuana was in plain view, N.T. 13; that the defendant had easy access to the marihuana from the paassenger area of the van, N.T. 17; and that the van contained a large quantity of marihuana (seven boxes and four bundles, N.T. 27) (nearly 251 pounds, N.T. 177-78). In addition, the defendant attempted to conceal the exposed brick of marihuana after having been requested to hand it over to the trooper. N.T. 18 & 169. From the totality of these circumstances, the jury could readily infer that the defendant not only knew of the marihuana but also had the ability and intent to exercise control over it.

Similarly, the jury could conclude,

based on the evidence before it, that the substance found in the van was indeed marihuana. In his motion in arrest of judgment, the defendant challenges the Commonwealth's case on this point; the defendant contends that the Commonwealth "failed to prove by competent expert testimony that the seized substance was marihuana." Defendant's Amended Motion in Arrest of Judgment ¶3. Specifically, the defense argues that in the absence of testimony concerning the purported standard relied upon in the thin-layer chromatographic test, the expert testimony by the chemist was insufficient to support the guilty verdict. Defense counsel had objected at trial to the chemist's testimony concerning the test on the grounds of lack of foundation. Counsel argued that testimony concerning the tests that were

run on the standard was required. N.T. 96.

Although the identification of drugs may be proved by circumstantial evidence only, without chemical analysis, Commonwealth v. Williams, 285 Pa. Superior Ct. 515, 428 A.2d 165 (1981), the Commonwealth in the instant case offered to the jury the benefit of testimony by an expert, employed in the Pennsylvania State Police Crime Laboratory, who had conducted chemical tests on samples of the seized substance. The witness's experience was extensive (more than 10,000 prior specimen examinations). N.T. 77. Furthermore, he had not relied upon merely one test in identifying the substance as marihuana; in addition to the thin-layer chromatographic test, the chemist had visually examined the substance, conducted microscopic examinations, and conducted the modified

Duquenois-Levine color test. N.T. 92-95. Thus, even if the testimony of the thin-layer chromatography would have been excluded, the remaining testimony was still sufficient to sustain the conviction. See Commonwealth v. Leskovic, 227 Pa. Superior Ct. 565, 307 A.2d 357 (1973). The chemist testified that the standard used by him was certified. N.T. 97. His failure to somehow personally test the standard went to the weight of his testimony, not to its admissibility. Commonwealth v. Kinkead, 257 Pa. Superior Ct. 307, 390 A.2d 836 (1978) (Van der Voort, J., with one Judge concurring and one Judge concurring in the result), aff'd. 494 Pa. 321 431 A.2d 280 (1981) per curiam).[7] Defense counsel extensively

[7]Defense counsel has cited no Pennsylvania cases in support of his position.

cross-examined the chemist on this particular test. See N.T. 108-14, 117-25 & 145-48. Viewed in its entirety, the record amply supports a conclusion that the seized substance was marihuana.

In his final plea for an arrest of judgment, the defendant generally asserts tht he is not guilty upon the law and evidence. A thorough view of the entire trial record, drawing all reasonable inferences in favor of the Commonwealth, leads us to the inescapable conclusion that a guilty verdict is well supported. Accordingly, the defendant's motion in arrest of judgment cannot be granted.

II

The defendant raises multiple points in support of his motion for a new trial, the first one being that the court erred in denying his suppression motion. De-

fense counsel argued in his brief in support of the motion to suppress that the affidavit in support of the warrant to search the van contained a deliberate, material false statement by the affiant, vitiating the search and requiring suppression of the seized marihuana.[8] Thus, the validity of the warrant is the only issue here.

In particular, the defendant takes issue with the last paragraph of the trooper's affidavit, which reads:

> The undersigned believes that the subject van contains large quantitites of marijuana by virtue of the presence of numerous other boxes matching the one in which the large brick of marijuana was observed. The presence of this amount of marijuana is also

[8]All of the marihuana was the fruit of this search except for the brick protruding from the box in plain view, which was seized immediately after the initial stop on the turnpike.

> apparent because of the intense odor in the van.

(Emphasis added.) During the cross-examination of the affiant at the suppression hearing, defense counsel focused on the physical descriptions of the box from which the marihuana was protruding in plain view and those beneath. Notes of Testimony from February 2, 1982, Suppression Hearing 20-33. His obvious purpose was to show that the boxes were not "matching," as stated in the affidavit.

The law is clear on this matter: A warrant is invalid and any evidence obtained pursuant to that warrant is inadmissible when the detached and objective determination by a magistrate is negated by a knowing misstatement of a material fact by the police officer. Commonwealth v. D'Angelo, 437 Pa. 331, 263 A.2d 441 (1970). First, there must be a "misstate-

ment." Id. In the instant case, defense counsel argues that "matching" connotes "equal" or "identical," and as evidenced by the affiant's testimony, the boxes were not identical but had several distinguishing characteristics. The affidavit itself, however, suggests that by describing the boxes as matching, the affiant was indicating that they were similar, at least in some characteristics. In fact, on the first page of the affidavit the affiant relates having observed "numerous other similar boxes." (Emphasis added.)

Assuming arguendo that use of the word "matching" constituted an improper comparison of the boxes, the warrant is nevertheless valid. There is no reason to believe that the alleged misstatement was deliberate or knowing. "If . . . the affiant [had] a reasonable belief in the

truthfulness of the information contained in the affidavit, even though a mistaken one, the fourth amendment's protection against unreasonable search and seizure is not violated." Commonwealth v. Bradshaw, ___ Pa. Superior Ct. ____, ____, 434 A.2d 181, 183 (1981). We conclude that he had a "reasonable belief" in the truthfulness of his affidavit. Moreover, the alleged misstatement was not material. For a falsity to render a search invalid, it must be material; that is, it must be a fact without which probable cause to search would not exist. Commonwealth v. Jones, 229 Pa. Superior Ct. 224, 323 A.2d 879 (1974). The mere presence of a falsity is not enough. Commonwealth v. Tucker, 252 Pa. Superior Ct. 594, 384 A.2d 938 (1978). The test was enunciated by the superior court in Commonwealth v.

Yucknevage, 257 Pa. Superior Ct. 19, 390 A.2d 225 (1978);

> In deciding whether a misstatement is material, however, the test is not whether the misstatement strengthens the application, but rather it is essential to it. This is determined by deleting the misstatement from the application, and then seeing whether the application still states enough to show probable cause. (Citations omitted.)

Id. at 24, 390 A.2d at 227. Applying this test to the affidavit in question, we can readily conclude that probable cause existed even without taking into account the characterization of the other boxes as "matching." Accordingly, the search warrant is valid and the suppression motion was properly overruled.[9]

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[9]By upholding this search on the basis of a validly executed search warrant, we in no way mean to imply that a search war-
[footnote continued on next page]

Next, the defendant claims a denial of his right of confrontation as a result of the limits imposed by the court on the defense's cross-examination of the chemist. While we are well aware that the sixth amendment right of confrontation guarantees a state criminal defendant certain rights to cross-examination of prosecution witnesses, Davis v. Alaska, 415 U.S. 308 (1974), we have no difficulty in concluding that the defendant took full advantage of this right without prejudicial interference by the trial judge. Defense counsel's cross-examina-

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[9][footnote continued from previous page] rant was required in this case. See generally United States v. Ross, 50 U.S. L.W. 4580 (June 1, 1982). Whether the search could have been conducted pursuant to the automobile exception to the fourth amendment warrant requirement is a question we need not decide in light of our denial of the suppression motion on the grounds stated.

tion, which covered sixty-three pages of the record, was detailed and extensive. Regarding the defendant's multiple species defense, that issue has been laid to rest by our superior court in Commonwealth v. Martin, 277 Pa. Superior Ct. 326, 419 A.2d 795 (1980), where, like the instant case, the defendant argued that the Commonwealth failed to prove that the marihuana was Cannabis sativa L. as distinguished from other species of Cannabis. The Commonwealth's expert testified in Martin that the substance was marihuana and that Cannabis sativa L. was the only species of marihuana. Similar testimony was received in this case. See N.T. 99 & 133. Furthermore, in both cases the defendant offered no evidence on this point. Consequently, we are bound by the superior court's rejection of defendant's position

in Martin.

As his fifth point for a new trial, the defendant takes issue with the absence of an instruction conference prior to trial arguments, although he cites no Pennsylvania law requiring such a conference. It has not been the practice of the trial judge to hold a pre-argument instruction conference, and our reading o Pa.R.Crim.P. 1119 leads us to believe one is not required. Rule 1119(a) reads:

> Any party may submit to the trial judge written requests for instructions to the jury. Such requests shall be submitted within a reasonable time before the closing arguments, and at the same time copies thereto shall be furnished to the other parties. The trial judge shall charge the jury after the arguments are completed, and shall then rule on all written requests.

(Emphasis added.) The record clearly in-

dicates that defense counsel was not prejudiced by proceeding with his closing argument without the benefit of the court's rulings. In fact, counsel was told that "[i]f there [was] some particular matter [he wanted] to know whether [he] should cover in [his] address [the judge would] discuss that with [him]." N.T. 184. Accordingly, the defendant's objection is without merit.

The remaining grounds advanced in support of the defendant's motion for a new trial all concern the court's charge to the jury. First, the defendant contends that the court erred in failing to give an instruction concerning the lesser included offense of simple possession. A review of the record, however, reveals that the absence of such a charge does not necessitate a new trial.

Specifically, defense counsel did not make a timely request for a lesser-included-offense instruction. Although in his brief the defendant argues that requested instruction number 29 constituted such a request, our reading of that instruction reveals that the defendant requested a binding instruction on the jury to find the defendant not guilty of simple possession; the request was not for a lesser-included-offense instruction. Requested instruction number 29 reads: "Upon the law and all the evidence you must find the defendant not guilty of the crime of simple possession of marihuana." (Emphasis added.) Moreover, the record reveals that defense counsel requested a lesser-included-offense instruction only after the court had given the general charge and a subsequent specific instruc-

tion on venue per defendant's request. N.T. 197. The request coming at this point in the proceedings was not timely. Rule 1119(a) indicates that requests for jury instructions should come prior to closing arguments. See also Commonwealth v. Gardner, 246 Pa. Superior Ct. 582, 371 A.2d 986 (1977); Commonwealth v. Lawrence, 58 West. 174 (1976). The court was not required to instruct on a lesser included offense absent a timely defense request, see Commonwealth v. Johnson, 460 Pa. 493, 333 A.2d 881 (1975), and the defendant's failure to make a timely request constituted a waiver.[10]

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[10]Untimely requests must be discouraged to prevent unending specific instructions subsequent to the general charge which could serve to confuse the jury and place undue weight on those matters that were last raised. The prospect for tactical maneuvering to gain an advantage in the minds of the jurors leads us to view with [footnote continued on next page]

Lastly, the defendant contends that the court erred when it failed to give

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10[footnote continued from previous page] disfavor last minute requests.

In the alternative, we find that a lesser-included-offense instruction was inapplicable to the presented facts of this case and was not required even if a timely request had been made. The defendant cites Commonwealth v. Wilds, 240 Pa. Superior Ct. 278, 362 A.2d 273 (1976), for the proposition that an instruction of possession should have been given since the elements of that offense are included within the charge of possession with intent to deliver. In Wilds, however, the police seized less than five pounds of marihuana. In the instant case, more than 251 pounds of marihuana were seized. The evidence simply does not support a conviction for simple possession, thus none was required. See Commonwealth v. White, 490 Pa. 179, 415 A.2d 399 (1980). It is not a rational conclusion that the defendant would have possessed 251 pounds of marihuana for his personal use. The most likely effect of a lesser-included-offense instruction in this case would be to provide an opportunity to a jury that might otherwise acquit the defendant to reach a compromise verdict of simple possession. The Commonwealth took the position, and we agree, that the defendant was either guilty of possession with intent to deliver or he was guilty of nothing.

requested instructions numbers 3-6, 8, 16, 19, 23, 24, 27 and 34. Our review of the record reveals, however, that the general charge covered many of the points requested in these specific requests, although the wording of the defendant's points was not used. All requested instructions concerning the possessory element of the crime were adequately covered. The defendant is entitled to have the jury instructed as to the law, but not to have his requested instruction read verbatim. Commonwealth v. Gardner, 246 Pa. Superior Ct. 582, 371 A.2d 986 (1977).

Admittedly, several requested instructions were not covered. These instructions had no applicability to the case and were properly refused. See Commonwealth v. Showalter, 275 Pa. Superior Ct. 1, 418 A.2d 580 (1980). The evidence

did not justify instruction on fleeting possession (instruction no. 8), production of weaker evidence when stronger evidence was available (instruction no. 12), or destruction of evidence (instruction on. 34). When viewed in its entirety, the charge is adequate and does not taint the decision reached by the jury, a decision unquestionably supported by the evidence presented at trial.

In sum, our review of the entire record leaves us with no doubt that the defendant received a fair trial to which he was entitled. Moreover, the verdict reached by the jury was based upon sufficient evidence. None of the reasons advanced by the defendant justify the granting of his motions in arrest of judgment and for a new trial.

ORDER OF COURT

AND NOW, June 17, 1982, for the reasons appearing in the opinion filed this date, the defendant's motions in arrest of judgment and for a new trial are denied. The Probation Office is directed to prepare a pre-sentence report after which the District Attorney shall schedule the case for sentencing.

By the Court,

/s/ Dale F. Shughart, P.J.

J. Michael Eakin, Esquire
Assistant District Attorney

James M. Shellow, Esquire
David J. Foster, Esquire
For Defendant

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
VS	:	
JEFFREY WAYNE ABBETT,	:	
Appellant	:	No. 02027 Philadelphia 1982

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of CUMBERLAND County be, and the same is hereby AFFIRMED.

BY THE COURT:

/s/ J. Daniel Henry
Prothonotary

Dated: April 6, 1984

IN THE
SUPERIOR COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania	:	Philadelphia District
v.	:	
Jeffrey Wayne Abbett, Appellant	:	C.P.-Criminal-Cumberland-No. 907, 1981 No. 2027 Philadelphia, 1982

ORDER OF COURT

AND NOW, this 5th day of June, 1984, appellant's application for reargument is denied.

/s/ Per Curiam

October 15, 1984

Alan Ellis, Esq.
ELLIS FOGELNEST & NEWMAN, P.C.
Suite 315, 1420 Walnut Street
Philadelphia, PA 19102

In Re: Commonwealth v. Jeffrey Wayne Abbett
No. 391 E.D. Allocatur Docket, 1984

Dear Mr. Ellis:

This is to advise you that your Petition for Allowance of Appeal, filed in the above-captioned matter, was denied by the Court on October 12, 1984.

Very truly yours,

/s/ Patrick Tassos
Deputy Prothonotary

PT:ml
cc: J. Michael Eakin, Esq.

In the Court of Common Pleas of the
County of Cumberland

COMMONWEALTH OF
PENNSYLVANIA

V.

907 CRIMINAL 1981(A)
CHARGE: UNLAWFUL POSSESSION OF A SCHEDULE I CONTROLLED SUBSTANCE WITH INTENT TO DELIVER
35 Pa.C.S.A. 780-101 et seq.
CITATION OF STATUTE AND SECTION

1. JEFFREY WAYNE ABBETT

GRADE: F
IMPRISONMENT: 5 yrs.
FINE: $15,000

The District Attorney of Cumberland County, by this information charges that, on (or about) Friday, the 16th day of October, 1981, in said County of Cumberland,

JEFFREY WAYNE ABBETT

did unlawfully, and feloniously, knowingly, or intentionally possess with the intent to deliver a Controlled Substance, to wit: Marijuana (approximately 251 pounds) a Schedule I substance.

All of which is against the Act of Assembly

and the peace and dignity of the Commonwealth of Pennsylvania.

/s/
Attorney for the
Commonwealth